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Conflicts of Interest Under the Revised Model Rules

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I. INTRODUCTION

Critics of the rules of professional conduct promulgated under the authority of state supreme courts sometimes claim that these rules do not have much influence on the behavior of lawyers. Moral judgment, trained intuition, or a certain seat-of-the-pants bravado actually characterize lawyers' decisionmaking, rather than a careful study of the rules. As one professor and former lawyer writes:

> I had cause to refer to the Model Rules of Professional Conduct exactly twice in eight years; I almost never heard any other lawyer refer to them. Lawyers make decisions every day about what conduct is ethical and about whether they will behave ethically, but often the formal rules have little to do with those decisions.[1]

Another scholar of the legal profession claims that "there is little evidence that anyone pays attention to ethical rules beyond the small proportion of lawyers who draft, discuss, and enact them."[2] There are some areas in which one's "moral compass" or experience is a pretty reliable guide. A lawyer does not need a disciplinary rule to point out that lying to the court is a bad idea, or that one should not communi-

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1. Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 713 (1998) (footnote omitted).
2. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 668 (1981).

cate with an opposing party who is represented by counsel. Where enforceable disciplinary rules overlap with one's moral judgment, it may not be terribly risky to fly by the seat of one's pants.

If there is any area in which intuition is *not* a reliable proxy for study of the rules, however, it is conflicts of interest. Conflicts doctrine is notoriously complex and subtle—more like the hearsay rule in evidence or the rule against perpetuities than a clear, intuitively plausible prohibition like that against commingling personal and client funds. To be more precise, *some* conflicts rules are straightforward and easy to apply, particularly those involving a conflict between the client's interests and the lawyer's own "financial, business, property, or personal interests."[3] For example, lawyers should not enter into sexual relationships with their clients, because of the fiduciary nature of the lawyer-client relationship.[4] But when it comes to conflicts involving multiple client representation, where the interests of one client interfere with those of another, things get a bit murkier.

Accordingly, this Article sets out the existing Nebraska law of multiple client conflicts for the purpose of comparing it with the revised *Model Rules of Professional Conduct*, approved by the ABA House of Delegates in 2002.[5] The new version of the *Model Rules* is the result of several years of work by the so-called Ethics 2000 Commission, comprised of prominent lawyers, judges, and academics.[6] It preserves the structure and much of the language of the 1983 version of the *Model Rules*, which differed dramatically from the predecessor *Model Code of Professional Responsibility*. Because Nebraska has not adopted the *Model Rules*, it is one generation behind other jurisdictions considering the Ethics 2000 modifications. At least in the area of conflicts, however, the differences between existing Nebraska law and the Ethics 2000 version of the *Model Rules* are not that stark. In fact, the results of most of the reported Nebraska conflicts cases can be fitted comfortably within the analytical framework of the new *Model Rules*. There is nothing radical about the new rules in the area of conflicts.

This observation raises the obvious question—why make the change? The *Model Code* has served Nebraska lawyers well, so perhaps it should be retained. The answer is that as they work through

3. NEB. CODE OF PROF'L RESPONSIBILITY DR 5-101(A) (1996).
4. *See* State *ex rel.* Neb. Bar Ass'n v. Freese, 259 Neb. 530, 611 N.W.2d 80 (2000).
5. MODEL RULES OF PROF'L CONDUCT (2002).
6. *See generally* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002). The Ethics 2000 Commission's report was debated at three meetings of the ABA House of Delegates in 2001 and 2002, and bits of the report were approved at each of these meetings. The most current version of the *Model Rules* is available from the ABA's website at http://www.abanet.org/cpr/ethics2k.html (last visited Jan. 18, 2003).

novel questions of law, Nebraska courts can benefit from the guidance of courts in the overwhelming majority of other jurisdictions, which have adopted state disciplinary rules patterned after the *Model Rules*. With recent changes by Virginia and Tennessee, only Iowa, Nebraska, Ohio, and Oregon retain rules based primarily on the *Model Code*.[7] Although the results of decisions under the *Model Code* often track those under the *Model Rules*, the analytical structure varies considerably. For example, Nebraska DR 5-105 uses the vague term "differing interests" to describe a conflict; the new version of Model Rule 1.7 clarifies the scope of the client interests that may differ from those of another client by using the terms "direct[ ] advers[ity]" and "material[ ] limit[ation]" on the lawyer's ability to represent the other client. Not only is the *Model Rules* terminology more precise, but if a court is interested in determining just what constitutes direct adversity of a material limitation, it has a vast amount of analogous authority to consult. Secondary sources such as the Hazard and Hodes treatise,[8] as well as the Reporter's Notes to the recently issued *Restatement (Third) of the Law Governing Lawyers*[9] already cite and discuss primarily *Model Rules* cases. Naturally as time goes on, the dominance of the *Model Rules* will only increase. Thus, lawyers faced with an uncertain conflicts situation will find it more difficult to find guidance in the law if Nebraska retains its *Model Code*-based disciplinary rules.

II. HOW CONFLICTS ISSUES CAN BE PRESENTED

It is all the more important that the law of conflicts of interest be clear and predictable in light of the serious consequences that can attach to a lawyer's violation of one of the rules. It is fairly unusual for a lawyer to be subjected to professional discipline solely for representing conflicting interests, although conflicts can sometimes be one of several grounds for discipline. On the other hand, motions to disqualify a lawyer, resulting from allegations of conflicts of interest, represent a serious risk. In Nebraska, non-clients generally do not have standing to assert conflicts,[10] but present and former clients may file a motion

7. New York uses the numbering system of the *Model Code*, but has adopted a great deal of language from the *Model Rules*. California has an idiosyncratic blend of rules and statutes to regulate lawyers.

8. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (3d ed. 2001).

9. (2000). Oddly enough, this is actually the *first* restatement on this subject, but the American Law Institute is in the process of preparing the third series of restatements in areas like torts. Thus, it deemed the law of lawyering restatement to be part of the third series as well.

10. *See* Hawkes v. Lewis, 255 Neb. 447, 586 N.W.2d 430 (1998). The exception to this rule is that the state may raise conflicts issues in criminal cases, to prevent the introduction of reversible error as the result of multiple simultaneous representation of co-defendants. *See* State v. Ehlers, 262 Neb. 247, 631 N.W.2d 471 (2001).

to disqualify a lawyer who is in violation of one of the conflicts rules. Courts are empowered to disqualify lawyers as an aspect of their inherent authority to regulate the practice of law of attorneys who appear before them.[11] They are not required to follow the disciplinary rules in deciding disqualification motions, but in practice most courts will be guided in large part by the rules, rather than trying to fashion a standard for disqualification in a vacuum.[12] Motions to disqualify are the procedure by which the conflicts issues were presented in most of the leading Nebraska cases,[13] and disqualification presents one of the most serious downside risks for lawyers working through multiple client representation.

The other serious risk is liability to a current or former client. Liability for malpractice is not limited to negligence, in the sense of failing to perform some task according to the standard of care. Lawyers may also be liable to a client or former client for breaching any of the fiduciary duties they owe,[14] including the duty to refrain from impermissibly representing conflicting interests.[15] In deciding whether a multiple representation is impermissible, courts often refer to the disciplinary rules for guidance, even though the preamble to the *Model Rules* expressly disavows any presumption that a violation of a rule would be an actionable civil wrong.[16] Thus, in cases where disqualification is appropriate, a lawyer also faces potential civil liability for breach of fiduciary duty. For similar reasons, conflicts of interest also create a potential defense to an action by the lawyer against the client to collect fees.[17] Disqualification orders entered by trial courts are sometimes accompanied by fee-forfeiture orders, but even if the court does not order forfeiture directly, it is likely that a client whose lawyer was disqualified from representation will resist paying fees for that work.

The remainder of this Article considers the two broad categories of multiple representation conflicts—concurrent and successive representation. The discussion of successive representation conflicts is subdivided into three subcategories which each require a somewhat distinct analytical process—side-switching, migratory lawyers, and prospective clients.

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11. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6(8) (2000).
12. *See, e.g.*, Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981).
13. *See, e.g.*, State *ex rel.* Creighton Univ. v. Hickman, 245 Neb. 247, 512 N.W.2d 374 (1994); State *ex rel.* FirsTier Bank v. Buckley, 244 Neb. 36, 503 N.W.2d 838 (1993).
14. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (2000).
15. *Id.* § 16(3).
16. MODEL RULES OF PROF'L CONDUCT, Scope, ¶ 20 (2002).
17. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000).

III. CONCURRENT REPRESENTATION CONFLICTS

Sometimes called "current-client" conflicts, these cases involve a lawyer simultaneously representing two or more clients whose interests may be somehow at odds. Under the Nebraska Code, a lawyer is prohibited from beginning or continuing a professional relationship with a client where taking the new client would interfere with the lawyer's independent professional judgment or involve the lawyer in representing differing interests.[18] The key to the analysis here is the concept of independent professional judgment. Under agency law as well as the more specific law governing lawyers, a lawyer is required to be an effective, diligent, loyal representative of the client. The lawyer must be able to give advice about all of the client's options, without holding anything back for fear of interfering with another client's interests. When a lawyer takes on a new client, she must ask whether the duties she is assuming with respect to the new client—competence, diligence, confidentiality, loyalty, and so on—will require her to do something for the new client that will impair her ability to discharge those same duties to existing clients. The essence of a concurrent conflict of interest is therefore the inability of a lawyer to fulfill her professional obligations to one client because of the need to fulfill professional obligations to another client.

The *Model Rules* employ different language, but the considerations underlying the rules are the same. A concurrent conflict of interest is defined as the representation of one client *directly adverse* to another client, or a case in which there is a significant risk that the representation of one client will be *materially limited* by the lawyer's obligations to another client.[19] The clearest case of direct adversity is easy to imagine—one client suing another, with the lawyer representing both in the same litigation. As the comments to Rule 1.7 make clear, however, direct adversity conflicts can arise in transactional matters, as where the same lawyer represents both the buyer and seller, or in litigation where the lawyer must cross-examine one client, who ap-

18. NEB. CODE OF PROF'L RESPONSIBILITY DR 5-105(A) & (B) (1996). Throughout this section, I will speak of a lawyer and a law firm interchangeably. The current Nebraska provision imputes the conflicts of one lawyer to others "affiliated . . . at the same firm." *Id.* DR 5-105(D). The same result is provided for by the *Model Rules*. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2002). In some jurisdictions, other lawyers in a law firm may be able to continue to represent a client even in cases where a newly hired lawyer would be personally disqualified from representing that client. The solution of screening, which is highly controversial, applies only to migratory lawyer (former-client conflicts) cases, and only in a small number of jurisdictions. There is no such thing, anywhere, as screening to cure imputation of a concurrent representation conflict.

19. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2002). Under the 1983 version of the *Model Rules*, direct adversity and material limitation conflicts were handled by Rule 1.7(a) and 1.7(b), respectively. *See* MODEL RULES OF PROF'L CONDUCT (1983) (amended 2002).

pears as a witness, while representing another client at trial.[20] Material limitation conflicts are simply those conflicts that are less severe than direct adversity conflicts, but which nevertheless interfere with the lawyer's ability to exercise independent professional judgment on behalf of all affected clients.

It is important to understand direct adversity and material limitation not as conceptually distinct, but as points along a continuum. Consider, as an example, a well known case that appears in many professional responsibility textbooks.[21] The case involved civil rights litigation against the State of New Hampshire by two classes of plaintiffs, mentally handicapped children who lived in a state institution, and female prison inmates. Both classes were represented by the same legal aid office, but a conflict arose when the State offered to settle the prisoner litigation by constructing a better facility for the female inmates—on the grounds of the school for the handicapped kids! The court handled the conflict for the legal aid lawyers as one of material limitation, but it would not have been wrong to analyze it as a direct adversity conflict. In any event, nothing in the remainder of the analysis turns on whether the conflict is one of direct adversity or material limitation. For this reason, the Ethics 2000 revision of the *Model Rules* rewrote the current-client conflicts rule so that the question is posed as whether a concurrent conflict of interest exists;[22] this term is further defined as either direct adversity or material limitation, and it is clear from the rule that the subsequent analysis of consentability is not affected by what kind of concurrent conflict of interest is present.

Under the current Nebraska provision, the prohibition on multiple representation where a conflict exists is waivable by the affected clients, provided that each affected client consents after full disclosure of the effect of the multiple representation on the lawyer's professional judgment *and* if it is obvious that the lawyer can provide adequate representation to both.[23] The rule does not expressly describe cases in which a lawyer could not represent multiple clients, even with consent, but judicial interpretation of the rule has carved out categories of non-waivable conflicts, where the adversity of the clients' interests is so severe that no lawyer could fulfill her fiduciary obligations to the various clients simultaneously.

An example of a non-waivable conflict was presented by a dispute between the operator of a grain elevator and several farmers.[24] In short, the elevator claimed it had issued mistaken delivery receipts,

20. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmts. 6-7 (2002).
21. Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987).
22. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2002).
23. NEB. CODE OF PROF'L RESPONSIBILITY DR 5-105(C) (1996).
24. Wendell's, Inc. v. Malmkar, 225 Neb. 341, 405 N.W.2d 562 (1987).

and sued for unjust enrichment of the farmers. Each of the farmers, as well as the agent of some of the farmers, named Malmkar, was represented by the same lawyer. The lawyer claimed he had disclosed the possible grounds for the clients' conflicting interests, but the Nebraska Supreme Court "specifically disapprove[d]" of the multiple representation.[25] It did not disqualify the lawyer—indeed, it accepted his briefs and tried as best it could to sort out the factual record—but it warned that the clients had been served badly by the simultaneous representation. The problem was that the interests of Malmkar and the farmers were not harmonious. Malmkar acted as the farm manager for some of the defendants and the agent for the storage of their corn for the others. Malmkar commingled his own corn with those of his principals, so that the only way the farmers could establish the amount of their own deliveries was through reliance on Malmkar's records. Because of Malmkar's dual role as principal and agent for the other farmers, his own litigation posture against the elevator was different from that of the other farmers; thus, it would have been impossible for the same lawyer to develop the record fully at trial with respect to all of his clients.

Although the Nebraska court did not say so in as many words, it essentially held that the conflict in this case is non-waivable or non-consentable. The strain to provide competent and diligent representation to the farmers and to Malmkar was so severe that no reasonable lawyer could be expected to fulfill his professional obligations to all of his clients simultaneously. Thus, even though the clients agreed to the multiple representation, the lawyer nevertheless should not have taken them all as clients. Using the language of the Nebraska provision, it is not obvious that the lawyer could represent the interests of each client adequately.[26] Unfortunately, the court began its analysis with an overly broad dictum: "We specifically disapprove the actions of attorneys in representing conflicting interests in litigation, even with the consent of the clients involved."[27] The court goes on to elaborate that, in this case, the multiple representation made it impossible for the defendants' lawyer to develop an adequate record at trial and on appeal with respect to the farmers and to Malmkar.[28] The holding of this case is therefore that *on these facts*, the conflict was not consentable. Had there been no adversity between the farmers and Malmkar, the conflict may have been consentable. For instance, if Malmkar had been just another one of the farmers who had delivered grain to the elevator, and not the manager and agent for the other farmers, the litigation posture of all the defendants would have been

25. *Id.* at 344, 405 N.W.2d at 565.
26. NEB. CODE OF PROF'L RESPONSIBILITY DR 5-105(C).
27. *Malmkar*, 225 Neb. at 344, 405 N.W.2d at 565.
28. *Id.* at 345, 405 N.W.2d at 566.

similar. They all would have claimed that the delivery receipts were not mistaken, and that they were not unjustly enriched. In that hypothetical case, there would be nothing improper about the same attorney representing all the defendants, because the lawyer would be able to provide effective representation to each of the clients.

The Ethics 2000 version of the *Model Rules* provides a much clearer analysis of the issue of consentability. Under Rule 1.7(b), most concurrent representation is permissible provided that each affected client gives informed consent, confirmed in writing.[29] "Informed consent" is a term of art in the *Model Rules*, drawn from the law of medical malpractice. It means consent by the client after the lawyer has communicated adequate information about the risks of simultaneous representation and the reasonably available alternatives.[30] This information must include "possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved."[31] Lawyers often err by disclosing too little, perhaps trying to "finesse" the clients into consenting. In one Nebraska disciplinary proceeding, a lawyer represented a husband and wife jointly in a personal-injury action.[32] A few months later, the wife approached the lawyer to request that he represent her in divorce proceedings. The lawyer requested that the husband (still his client in the personal-injury litigation) consent to him representing the wife in the divorce case, and had him sign a handwritten note, but did not advise the husband of the consequences of his consent.[33] This was a serious error by the lawyer, because without full disclosure of the possible risks to the husband, his consent to the lawyer representing his wife in the divorce proceedings would be ineffective. For example, it is unlikely that the husband, an individual inexperienced in litigation, would have appreciated the potential effect on confidentiality of the multiple representation. In the course of the injury litigation, the lawyer would have access to a great deal of confidential information about the husband, some of which might be useful to the wife in the divorce. Perhaps the lawyer would have to cross-examine the husband at trial if the divorce proceedings went that far, and the lawyer would be in the position of

29. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2002). The previous version of the rule did not use the term "informed consent," but the language "consents after consultation" was interpreted to require full disclosure of the relevant risks of the simultaneous representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2), (b)(2) (1983) (amended 2002).

30. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2002). The *Restatement* commentary has an excellent list of the information that must be communicated in order to secure informed consent. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. c(i) (2000).

31. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 18 (2002).

32. State *ex rel.* Neb. Bar Ass'n v. Freese, 259 Neb. 530, 611 N.W.2d 80 (2000).

33. *Id.* at 534, 611 N.W.2d at 83.

having to attack the credibility of his own client. The husband would likely feel betrayed by this development, because he may assume that his own lawyer would never turn on him in any way. Although in sanctioning the lawyer the court focused on the sexual relationship that later developed between the wife and the lawyer,[34] the lawyer could just as readily have been disciplined for representing the wife in the divorce case without first obtaining informed consent, after full disclosure, from the husband.

Some conflicts are not consentable, even with the most complete disclosure. The *Model Rules* list three categories of non-consentable conflicts:

1. *Representations prohibited by law*,[35] which include cases of former government lawyers who are barred by federal or state statutes from undertaking the representation of particular clients for a given length of time, and representatives of government entities that are prohibited from consenting to conflicts of interest.[36]

2. *Asserting a claim on behalf of one client in litigation in which the same lawyer represents the opponent*.[37] The traditional view, still followed in many jurisdictions, is that a lawyer may never assert a claim against another current client, even if the matters are unrelated and the client is represented by other counsel in the litigation in question.[38] An emerging trend, by contrast, is to permit a lawyer to represent a client in a lawsuit against another client, provided that the lawyer is representing the second client on an unrelated matter.[39] The cases I am aware of that approve of a lawyer suing her own client on behalf of another client all involve large, sophisticated entity clients with diverse operations. It is almost inconceivable that a lawyer could proceed in this kind of case where the clients are individuals.

3. *Other cases in which the lawyer does not reasonably believe that she can provide competent and diligent representation to each affected client*.[40] The key here is to focus on the lawyer's professional duties, and ask whether it is possible for the lawyer to be an effective, vigorous, loyal representative of all clients simultaneously. I sometimes refer to these cases as "zero-sum" conflicts, to capture the idea that there is no way one client can get the best possible result if their lawyer is also trying to get the best possible result for the other client. These cases can arise in business transactions, where there are risks

34. *Id.* at 538, 611 N.W.2d at 85-86.
35. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(2) (2002).
36. *See id.* R. 1.7 cmt. 16.
37. *See id.* R. 1.7(b)(3).
38. Cinema 5 v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976); Grievance Comm. v. Rottner, 203 A.2d 82 (Conn. 1964).
39. *See, e.g.*, Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1344 n.3 (9th Cir. 1981).
40. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1) (2002).

and benefits that have to be allocated among the parties, and there is no win-win solution under which all of the parties come out ahead.

IV. SUCCESSIVE REPRESENTATION CONFLICTS

Successive representation, or former client conflicts take several different forms. In the simplest case, the lawyer or law firm switches sides, representing a new client in a matter that is adverse to that for which the lawyer formerly represented another client.[41] A more complex scenario is presented by a lawyer who leaves one firm and joins another; this is called the "migratory" lawyer problem.[42] Finally, interviews with prospective clients create a situation that can be handled by application of the ordinary successive representation rule, but which is given its own specific provision in the new *Model Rules*.[43] Each of these scenarios will be discussed briefly in turn.

A. Side-Switching Cases

The basic former client conflict case involves a lawyer or law firm[44] that clearly terminates its relationship with Old Client and subsequently undertakes a matter for New Client that is adverse to the interests of Old Client. Before looking at the Nebraska Code of Professional Responsibility and the *Model Rules*, it is important to raise an issue that is not specifically addressed by either set of disciplinary rules, namely determining whether the lawyer-client relationship with Old Client has been terminated. In the clearest case, the lawyer would have a copy of a letter in her file, written to the former client, saying something to the effect of, "It's been nice working with you, but at this point our professional relationship has ended." Naturally, lawyers hate to write these letters, because they would like their clients to think of their relationship with the lawyer as ongoing. If the circumstances surrounding the conclusion of the previous matter are ambiguous, a court may assume the lawyer continues to represent the client. This may be a good thing for business purposes, but from the standpoint of the conflicts rules, it creates a higher standard for the lawyer to meet. The rule governing concurrent representation prohibits lawyers from representing a second client, without the first client's consent, in any case in which the interests of the first client materially

41. These cases are governed by Model Rule 1.9, which was not changed in substance by the 2002 amendments.
42. Migratory lawyer cases involve the application of Rule 1.9. There is no separate rule governing them.
43. MODEL RULES OF PROF'L CONDUCT R. 1.18 (2002).
44. Again, it is appropriate to refer to a lawyer or law firm interchangeably, because personal conflicts of one lawyer are imputed to other lawyers in the firm. *See* NEB. CODE OF PROF'L RESPONSIBILITY DR 5-105(D) (1996); MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2002).

limit the lawyer's ability to provide competent and diligent representation to the second client, and vice versa. By contrast, the rule governing successive representation is limited to subsequent matters that are substantially related to those for which the lawyer represented the first client. In other words, a lawyer may represent New Client in a lawsuit against Old Client, as long as the matters are unrelated. If Old Client is really not a former client, however, the case would present a direct adversity conflict and the lawyer could not represent New Client without the consent of Old Client.[45]

There are numerous reported cases in which courts were called upon to decide whether the attorney-client relationship had actually terminated. In general, the rule is that an attorney-client relationship is ongoing and not terminated if (1) the client subjectively believes the lawyer is still representing her and (2) that belief is reasonable under the circumstances.[46] If the lawyer has represented the client over a long period of time on a variety of matters, the client is likely to believe reasonably that the lawyer continues to represent her, absent some clear evidence of termination.[47] On the other hand, if both parties contemplate at the outset that the representation will extend only to a discrete matter, when that matter is completed the relationship is at an end.[48]

As previously mentioned, a lawyer is prohibited from representing a client whose interests are materially adverse to those of a former client in the same or a substantially related matter.[49] Whether two matters are substantially related is a frequently litigated issue. In Nebraska, as in the majority of jurisdictions, "substantial relationship" is understood in terms of the confidential information learned by the lawyer in the course of representing Old Client, and whether that information could be used on behalf of New Client, to the detriment of Old Client.[50] It would be unfair to Old Client to force it to divulge secrets in the course of a disqualification proceeding, in order to prove that its lawyer was abusing confidential information, so courts conduct a "virtual" analysis of the transmission of confidential information.[51] A court considering a disqualification motion will look at the

45. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2002).

46. *See, e.g.*, Oxford Sys., Inc. v. CellPro, Inc., 45 F. Supp. 2d 1055 (W.D. Wash. 1999); Artromick Int'l, Inc. v. Drustar, Inc., 134 F.R.D. 226 (S.D. Ohio 1991).

47. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 4 (2002).

48. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 31(2)(e) (2000).

49. NEB. CODE OF PROF'L RESPONSIBILITY DR 5-108(A) (1997); MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2002). Note that the language of the Nebraska rule was drawn from the 1983 version of the *Model Rules*, and the 2002 amendments did not substantially change Rule 1.9.

50. *See* State *ex rel.* FirsTier Bank v. Buckley, 244 Neb. 36, 503 N.W.2d 838 (1993); State *ex rel.* Freezer Servs. v. Mullen, 235 Neb. 981, 458 N.W.2d 245 (1990).

51. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. d(iii) (2000).

nature of the two matters in question and, based on the legal and factual issues presented in both, essentially make an educated guess as to whether the lawyer might have learned confidential information in the first matter that will prove useful in the second matter.

Because the substantial relationship test is keyed to confidential information, it may require disqualification of a lawyer in a subsequent matter involving wholly different legal issues, as long as there is some factual overlap. The comments to the Ethics 2000 version of the *Model Rules* offer an example: "[A] lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce."[52] Even though the matters look distinct, there is a risk to the client that his confidential information may be abused by the lawyer; therefore, disqualification in the subsequent matter is warranted. Interestingly, the converse is also true. A lawyer may be permitted to represent New Client on practically the same kind of matter for which she formerly represented Old Client, as long as there is no risk to Old Client's confidential information. For instance, an insurance defense lawyer who handled slip-and-fall cases for Wal-Mart was permitted to represent the plaintiff in a slip-and-fall case after he ended his relationship with Wal-Mart.[53] The lawyer had access to "Wal-Mart's general defense strategy, internal policies, and the conduct of similar lawsuits in other parts of the country,"[54] but no information specific to the new plaintiff's matter. Because the lawyer did not acquire specific confidential information, the trial court properly denied Wal-Mart's motion to disqualify the lawyer from representing the plaintiff.[55]

Nebraska law on side-switching cases is very much in line with the nationwide weight of authority under the *Model Rules*. There will be very little change, compared with the present DR 5-108, if the Nebraska Supreme Court adopts Model Rule 1.9.

B. Migratory Lawyer Cases

Suppose a lawyer leaves Old Firm and joins New Firm. The two firms are representing clients whose interests are adverse. Even though the firms themselves have not switched sides, the moving lawyer may, in effect, cause New Firm to switch sides. The client of Old Firm is not likely to be happy that one of its former lawyers has now gone over to the enemy camp. On the other hand, if the firms are large enough, and have a diverse enough client base, they are bound

52. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2002).
53. State *ex rel.* Wal-Mart v. Kortum, 251 Neb. 805, 559 N.W.2d 496 (1997).
54. *Id.* at 808, 559 N.W.2d at 499.
55. *Id.* at 814, 559 N.W.2d at 502.

to have clients adverse to the clients of firms from whom they would like to hire lawyers. If conflicts rules were too strict, lawyers would find themselves stuck in the first job they took out of law school, because no other employer would hire them for fear of getting conflicted out of ongoing work. The rules on migratory lawyers are designed to balance the policies of client protection and the economic liberty of lawyers. They do so by focusing on the protection of confidential client information, and by making use of two presumptions:

Presumption #1: The moving lawyer is presumed to have acquired confidential client information of all clients of Old Firm.

Presumption #2: The moving lawyer is presumed to share this confidential information with other lawyers at New Firm.

These presumptions may or may not be *rebuttable*, depending on the jurisdiction. Nebraska is unusual in regarding the first presumption as irrebuttable.[56] Any lawyer at Old Firm will be personally disqualified from representing clients whose interests are adverse to any client of Old Firm; moreover, this personal "taint" is imputed to other lawyers in New Firm.[57] The consequence of this rule is that it can be extremely difficult for lawyers to make lateral moves among firms with diverse client bases. The *Model Rules*, as they have been interpreted in most jurisdictions, are more flexible. The first presumption is generally held to be rebuttable, upon a showing by the lawyer that she did not acquire material confidential client information. The rebuttable first presumption is often called the "*Silver Chrysler* rule" after the influential case of *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*[58] The lawyer may make this showing by introducing timesheets and affidavits to establish the extent of work she performed for the client of Old Firm, as well as the nature of the confidential information to which she had been exposed. In both Nebraska and the majority of *Model Rules* jurisdictions, the second presumption is irrebuttable—if a moving lawyer is personally disqualified, other lawyers in New Firm are also disqualified. A few jurisdictions permit

56. NEB. CODE OF PROF'L RESPONSIBILITY DR 5-108(B) (1997); State *ex rel.* FirsTier Bank v. Buckley, 244 Neb. 36, 503 N.W.2d 838 (1993). Courts and commentators in Nebraska refer to the irrebuttable first presumption as the "bright line rule." *See, e.g.*, Stephen E. Kalish, *To Provide a Common Conceptual and Linguistic Vocabulary in order to Foster Ethics Dialogue and Education: The Nebraska Supreme Court Should Adopt the Revised* Model Rules*—The "Bright Line" Rule Example*, 81 NEB. L. REV. 1351 (2003). The Nebraska Supreme Court even applied the bright line rule to support personnel, such as paralegals and secretaries, in *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994). This result was modified by the adoption of DR 5-109, which makes the first presumption rebuttable for moving support personnel, but not for lawyers.

57. NEB. CODE OF PROF'L RESPONSIBILITY DR 5-105(D) (1996); State *ex rel.* Freezer Servs. v. Mullen, 235 Neb. 981, 458 N.W.2d 245 (1990).

58. 518 F.2d 751 (2d Cir. 1975). The *Restatement* recognizes the *Silver Chrysler* rule. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. h (2000).

New Firm to rebut the second presumption by establishing a screen (sometimes called a "Chinese Wall") in a timely fashion. The Ethics 2000 Commission had proposed a rule permitting screening to rebut the second presumption in some cases, but the ABA House of Delegates voted at its August 2001 meeting to eliminate the screening provision.[59] Some states do recognize screening, however, either by rule amendment or judicial decision.[60]

If the Nebraska Supreme Court adopts the *Model Rules*, the most significant change from the existing law of successive representation conflicts will be the replacement of the bright line rule with the *Silver Chrysler* rule that permits a moving lawyer to rebut the first presumption of having acquired confidential client information pertaining to each client of Old Firm. This change may not be as dramatic as it appears, because the bright line rule may be eroding. The court in *Bechtold v. Gomez*[61] permitted a law student to move from a clinic at Creighton Law School to a private lawyer's office for a summer job, and then back to the clinic, without requiring disqualification of the clinic from representing a client adverse to a client of the private firm. The court discussed the bright line rule extensively, but concluded that it did not apply because the student was an independent contractor while working for the private firm.[62] The basis for this conclusion was that the student "had no real or perceived access to [the lawyer's] client files" and that there was "no evidence of gained confidences."[63] This conclusion is nothing other than the *Silver Chrysler* rule! It is a fact-specific determination that the moving lawyer—here, the student—did not acquire confidential information of a particular client and therefore should not be personally disqualified from representing clients with adverse interests. By weakening the bright line rule, the Nebraska Supreme Court is bringing Nebraska law more into line with the *Model Rules*.

Under the *Model Rules*, migratory lawyer cases are handled most clearly by Rule 1.9(b), although the same result may be reached under Rule 1.9(a). A lawyer is prohibited from representing a new client whose interests are adverse to those of a former client whom the lawyer had "represented" (under Rule 1.9(a)) or whom a firm with which the lawyer was associated had represented and about whom the lawyer had acquired material confidential client information (under Rule 1.9(b)). If representation, for the purposes of Rule 1.9(a) is understood

59. *See* 2003 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 55-56 n.* (Thomas D. Morgan & Ronald D. Rotunda eds., 2003).
60. The Morgan & Rotunda softcover volume of professional responsibility rules includes a chart prepared by Attorneys' Liability Assurance Society, Inc. giving a state-by-state analysis of screening. *See id.* at 173-75.
61. 254 Neb. 282, 576 N.W.2d 185 (1998).
62. *Id.* at 289, 576 N.W.2d at 191.
63. *Id.* at 289, 576 N.W.2d at 190.

using the *Silver Chrysler* rule—in other words, if access to confidential client information is the touchstone for disqualification—the result under Rule 1.9(a) is equivalent to that under Rule 1.9(b). A lawyer is presumed to have acquired confidential client information about all clients of her former law firm, but if she rebuts that presumption, she is not personally disqualified from representing new clients with interests adverse to clients of the former firm. If the lawyer is personally disqualified, she may always seek the informed consent of the former clients. Unlike Rule 1.7, the rule on successive representation conflicts does not carve out a category of non-consentable conflicts. All conflicts are consentable under Rule 1.9. As is the case with consent to concurrent representation conflicts, it must be given after communication by the lawyer of information about the risks of the successive representation.[64]

C. Dealing with Prospective Clients

In a brief interview with a prospective client, a lawyer may learn confidential information that could be used against the prospective client on behalf of another, if the prospective client chooses not to employ the lawyer. For this reason, the successive representation conflicts rule may bar the lawyer from taking on a subsequent client whose interests are materially adverse to those of the prospective client in the same or a substantially related matter. Nebraska law recognizes that the lawyer's duty to refrain from subsequently representing conflicting interests may be triggered by an initial interview with a prospective client.[65] In that case, the prospective client spoke with the attorney for approximately forty-five minutes in what she considered a confidential communication. The trial court subsequently disqualified the lawyer from representing an adversary of the prospective client, reasoning that an attorney-client relationship existed between the lawyer and the prospective client.[66] The Ethics 2000 version of the *Model Rules* recognizes the same principle, although the lawyer's duty does not depend on the actual formation of an attorney-client relationship.[67] Rather, in any discussion with a person in which there is a possibility of forming an attorney-client relationship, a lawyer must be careful because, if she learns information from the prospective client "that could be significantly harmful to that person in the matter" under discussion, the lawyer may not represent another client in the same or a substantially related matter if that new client's interests are materially adverse to those of the prospective client.[68]

64. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2002).
65. Richardson v. Griffiths, 251 Neb. 825, 560 N.W.2d 430 (1997).
66. *Id.* at 832, 560 N.W.2d at 435.
67. MODEL RULES OF PROF'L CONDUCT R. 1.18 (2002).
68. *Id.* R. 1.18(c).

V. CONCLUSION

Adopting a set of state disciplinary rules patterned after the *Model Rules* offers Nebraska courts and lawyers many advantages. Most law school professional responsibility courses are based on the *Model Rules*, so students are familiar with the structure and language of those rules. The Multistate Professional Responsibility Examination tests bar applicants on their knowledge of the *Model Rules*, and associated judicial interpretation, which creates pressure on review courses to omit discussion of the *Model Code*. Conferences, symposia, and continuing legal education programs around the nation take the *Model Rules* as their starting point. Most articles in law reviews and publications aimed at practicing lawyers discuss professional responsibility issues in terms of the *Model Rules*. Finally, the best available reference works use the terminology and structure of the *Model Rules*, with only a section of historical interest on the *Model Code*. The benefits to Nebraska lawyers and judges of an analytical framework shared with the rest of the nation would alone justify the transition to the *Model Rules*. Moreover, at least with respect to the subject of conflicts of interest, Nebraska law is already fairly close to the *Model Rules*, in substance if not in form. The result of the cost-benefit analysis seems clear—the Nebraska Supreme Court should consider revising the Nebraska disciplinary rules to bring them into line with the new version of the *Model Rules*.